**THE HIGH COURT OF UTTARANCHAL AT NAINITAL.**
**Appeal From Order No. 330 Of 2002**

The New India Assurance Company Ltd.
Through its Divisional Manager, Opposite Judges Court
Nainital Road, Haldwani (Nainital). …**Appellant.**

***Versus***

1. Dayanand Pandey, S/O Shri Devkrishna Pandey,
   R/O village Jawahar Nagar, Thana Pantnagar,
   Post Office Nagla Dairy, District Udham Singh Nagar.
   (Claimant).
2. Guljar Singh S/O Lakhwant Singh,
   R/O Lakhpur (Saley Pur) Rampur,
   District Rampur.

… **Respondents.**

**Sri T.A. Khan, Advocate, learned counsel for the appellant.**

**Date April 25, 2006**
**PC: Hon'ble B.S. Verma, J.**

This appeal under Section 173 of the Motor Vehicles Act, 1988 ***(for short the Act)*** is directed against the judgment and award dated 4-10-2002, passed by the Motor Accident Claims Tribunal/II Fast Track Court Nainital, in M.A.C. Petition No. 331 of 1998, Daya Nand Pandey Vs. Guljar Singh and another, whereby the learned Tribunal has awarded compensation of Rs. 65,000/- along with interest @ 19% per annum in favour of the claimant as against the Insurance Company-appellant.

Relevant facts of the case are that Jagdish Chandra lost his life in the night between 12/13-5-1998 at about 12.30 a.m. in a motor accident involving Tractor Trolley No. 6374 owned by O.P.No.1 and insured with the O.P. No.2-appellant, which was being driven rashly and negligently by its driver, with the result the deceased suffered grievous injuries and consequently died. The claimant is the father of the deceased, who has filed claim petition for compensation of Rs. 5,00,000/- alleging that the deceased was aged 25 years and earning Rs. 3,000/- per month from agriculture.

The owner of the vehicle filed his written statement alleging that the tractor of the opposite party was went out of order due to mechanical defect and it was stopped on the left side of road on ***kuchcha*** side. The deceased along with companion came on motor cycle being driven rashly and negligently and dashed the same with the tractor trolley, hence the deceased and his companion motor cyclist were negligent. It was alleged that the vehicle was duly insured with the New India Assurance Company.

The Insurance Company-appellant also filed its written statement and denied the allegations made in claim petition. It was asserted that the vehicle was not driven as per traffic rules and law. The owner and insurer of the motor-cycle were not arrayed as party, hence the petition is defective. The motor-cycle was not being driven by the licensed driver. The O.P.No.1 owner is required to prove that there was no violation of policy condition and it is proved that there was valid insurance of the vehicle on the date of accident.

The learned Tribunal framed necessary issues in the case and after recording evidence of the parties, it came to the conclusion to motor accident resulting in the death of Jagdish Chandra was caused due to rash and negligent driving by the driver of the tractor trolley in question. Ultimately, the claim petition was decreed for compensation of Rs. 65,000/- against the appellant vide judgment and award dated 4-10-2002.

In this appeal, the impugned award has been assailed mainly on the point of rash and negligent driving, validity of driving licence of the motor cyclist and breach of insurance policy.

It may be mentioned that the Insurance Company has not obtained permission of the learned Tribunal under Section 170 of the Act. Moreover, there is no such finding of the Tribunal that the claim petition has been filed in collusion between the claimant and the person against whom the claim has been made. In such

circumstances, it is not open to the Insurance Company to challenge the award passed by the Tribunal on the point of negligence or contributory negligence and also on the quantum of compensation in view of the law laid down by the Apex Court in the case of ***"National Insurance Company Ltd. Vs. Nicolletta Rohtagi and others"[( 2002) 7 S.C..C. 456].*** The appeal is not maintainable on this score. In that case, it has been observed by the Apex Court that ***"even if no appeal is preferred under Section 173 of 1988 Act by an insured against the award of a Tribunal it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regard negligence or contributory negligence of the offending vehicle".***

In the course argument, the learned counsel for the appellant has submitted that in this case the Insurance Policy was not subsisting. It had expired and the petitioner fraudulently by interpolation on the document with him filed the same before the Motor Accident Claims Tribunal and on the basis thereof, the learned Tribunal held the vehicle to be insured and fixed the liability of the review petitioner. This fact was detected subsequently by the officers of the appellant. It was pointed out that in a similar appeal preferred by the appellant bearing No. 293 of 2002 New India Assurance Company Ltd. Vs. Smt. Vimla Pandey and others, arising out of the same motor accident, the review petition No. 47 of 2005 arising out of A.O. No. 293 of 2002 decided on 27-8-2004 was allowed by the Division Bench of this Court vide order dated 31-03-2005. It has been submitted that this appeal may also decided in view of the order passed by the Division Bench of this Court dated 31-03-2005 because the present appeal is squarely covered by the said order.

I have gone through the order dated 27-8-2004 passed in A.O. No. 293 of 2002 as well as the order dated 31-03-2005 passed in Review Application No. 47 of 2005 arising out of A.O. No. 293 of 2002. It is clear that the said appeal also related to the

same motor accident which took place on 12/13-5-98 involving Tractor Trolley No. USI-6374 and facts of both the appeals are identical. This Court while allowing the Review Application preferred by the Insurance Company as observed in Para No. 3 as under:-

*"Since, it is altogether a new point/ground which was never raised before the learned Tribunal concerned and the claimant and owner of the vehicle were not afforded and in order to plead their case on these points, therefore, we feel it appropriate that the review petitioner may approach the learned Tribunal concerned under Section 151/152 and 153 of the Code of Civil Procedure. If the fraud is established, the same can be corrected as held by the Apex Court in the case of* ***"United India Insurance Col Ltd. Vs. Rajendra Singh and others (2000) 3 Supreme Court Cases 581."***

In view of the Division Bench order of this court, referred as above, this appeal is also disposed of in terms thereof. It is made clear that if the petitioner moves an application under Sections 151, 152 and 153 of the Code of Civil Procedure, the same shall be decided after hearing the respondent no. 2, owner of the tractor and in case the petitioner succeeds before the learned Tribunal, it may recover the amount from the owner.

**(B.S.Verma, J.)**

RCP